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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

Petitioner,

v.

THE UNITED STATES.

No. 328

THE UNITED STATES,

Petitioner,

v.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF AMICUS CURIÆ ON THE QUESTION OF THE RIGHTS OF AN INDIAN TRIBE IN STANDING TIMBER, MINERALS, ETC., ON LANDS WITHIN THEIR RESERVATION.

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I.

Preliminary Statement.

One of the questions in this case relates to the nature and extent of the rights of an Indian tribe in lands reserved for their use and occupation by treaty or Executive order,

particularly as regards such things as standing timber, mineral deposits in place, etc.

The Klamath Indians have an immediate interest in this question because it is also involved, as the Government maintains, in a case instituted by them and now pending in the Court of Claims, No. E-346.

The position of the Klamath Indians is that the whole beneficial interest in such lands, including the beneficial interest in the standing timber, mineral deposits, etc., belongs to the Indians, subject to the right of the United States, as sovereign and owner of the naked fee, to control alienation, and to prevent waste and recover the proceeds of anything severed from the lands by acts constituting waste, and to take possession of the lands should the Indians abandon them.

II.

Argument.

The nature of the Indian title has been discussed in many cases. In *Worcester* v. *State of Georgia*, 6 Pet. 515, 580, 8 L. ed. 483, 508, it was said:

> "* * * Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called *the right to the ultimate domain,* but the Indians have a present right of possession." [Italics ours.]

And again in *Mitchell* v. *United States*, 9 Pet. 711, 746, 9 L. ed. 283, 296:

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until

they abandoned them, made a cession to the government, or an authorized sale to individuals. * * *

"* * * it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites."

And in *Holden* v. *Joy,* 17 Wall. 211, 244, 21 L. ed. 523, 534:

"Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemoral, subject to the conditions imposed by the discoverers of the continent, which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed. They could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive preemption right to purchase, and the right to exclude the subjects of all other governments, and even their own, from acquiring title to the lands.

"Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs."

In *United States* v. *Cook,* 19 Wall. 591, 22 L. ed. 210, the controversy was over the ownership of logs cut from the Oneida Indian Reservation in Wisconsin by a member of the tribe for the sole purpose of sale. Holding, as had

always been held, that the Indians in possession of a reservation have only a right of occupancy in the land and that the fee is in the United States, it was decided that the members of the Oneida Tribe had no right to cut the timber on the land solely for the purpose of sale; that to do so was waste as in the case of the cutting of timber by a trespasser; and that the United States as the owner of the fee became the owner of the logs.

In reaching its conclusion the Court defined the nature and attributes of the Indian right of occupancy, saying:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee. * * *." 19 Wall. 593, 22 L. ed. 211.

And that—

> "This right of use and occupancy by the Indians is *unlimited*. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.
>
> "The timber, while standing, is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It *can* be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under

such circumstances is, in effect, only a legitimate use of the land." 19 Wall. 593, 22 L. ed. 211. [Italics ours.]

Thus, two points were decided. On the one hand, by analogy to the law relating to the respective rights of life-tenant and remainder-man, it was decided that the Indians have no right to cut the timber on an Indian reservation for the purpose of sale only; that to do so is waste, and that the title to timber so cut vests in the United States as the owner of the fee or "ultimate domain." On the other hand, it was decided that the Indians have an exclusive right of use and occupancy of *unlimited duration*, and the right to cut the standing timber *during the whole period of such occupancy* not only for use upon the premises but "for the purpose of improving the land or the better adapting it to convenient occupation," and the right to sell all timber cut for the latter purpose. This leaves the United States with no right to cut or dispose of the timber for any purpose of its own whatever.

The Government argues that the *Cook Case* decided that the *interest* of the Indians in the timber on their reservations "is that of a life tenant and no more." The Court did say, "What a tenant for life may *do* upon the lands of a remainder-man the Indians may *do* upon their reservation, but no more." 19 Wall. 594, 22 L. ed. 211. [Italics ours.] But in thus comparing the position of the Indians with that of a tenant for life, for the purpose of laying down a rule as to what things the Indians may and may not *do* on their reservations, the Court could not possibly have meant that the Indians' *interest* in the lands of their reservations is only that of a tenant for life. For that would have been directly in conflict with its carefully formulated statement, after reviewing prior cases, of the nature of the Indian title—that the Indians have a right of use and occupancy of *unlimited duration*, and an accom-

panying right of *unlimited duration* to cut timber for use upon the premises and also for the purpose of improving the land or the better adapting it to convenient occupation, and the right to sell all timber cut for that purpose.

In *Leavenworth, etc., R. R. Co.* v. *United States,* 23 Wall. 733, 23 L. ed. 634, the case was this: The Treaty of June 2, 1825, between the United States and the Osage Tribes of Indians, 7 Stat. 240, reserved for the occupancy of the Indians for an unlimited period a tract of land lying within the boundaries of what subsequently became a part of the State of Kansas. By an act approved March 3, 1863, 12 Stat. 772, Congress granted to the State every alternate section of land on each side of a projected line of railroad to aid in its construction. The state assigned the grant to the plaintiff in error. The line of the proposed railroad traversed part of the reservation of the Osage Indians. By the Treaty of January 21, 1867, 14 Stat. 687, the Indians ceded a part of their reservation, including the part through which this railroad passed, to the United States.

The question was whether the grant made by the Act of March 3, 1863, included the interest of the United States in the sections of land contiguous to the railroad in the Osage Reservation. It was held that this could not have been intended for the reason among others that the interest of the United States was only an "ultimate fee", subject to a "perpetual right of occupancy" in the Indians, and therefore would have been of no immediate practical benefit for the purpose of the grant. 23 Wall. 743, 23 L. ed. 638.

Referring to the nature of the Indian title in general, the Court said:

> "As long ago as in *Cherokee Nation* v. *Georgia,* 5 Pet. 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands

they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210, this right of occupancy has been held to be sacred as the title of the United States to the fee. * * * This *perpetual right of occupancy*, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or cum onere. *For all practical purposes, the Osages owned the lands* as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, *they might occupy their lands forever*, and whatever changed this condition or interferred with it, violated the guaranties under which they had lived since that date." 23 Wall. 742-743, 23 L. ed. 638. [Italics ours.]

In *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440, the question was as to the ownership of logs cut from a tract of land claimed by the defendant under a grant from the State of Minnesota made in 1870. The tract was within the limits of a grant of public lands from the United States to the State on the occasion of its admission into the Union in 1848.

The defendant's title was disputed on the ground that the tract was part of the land reserved for the occupancy of the Menomonee Tribe of Indians by the Treaties of 1825 and 1831 and therefore did not pass to the State by the grant of 1848.

It was held, citing *United States* v. *Cook*, *ante*, that while the Indians had a right of occupancy in the tract as a part of their reservation, the United States could and did by

the grant of 1848 transfer the fee,[1] 95 U. S. 525, 526, 24 L. ed. 441, 442; that this was only a *"naked fee,"* however, "subject * * * to the existing occupancy of the Indians *so long as that occupancy should continue,"* 95 U. S. 525, 526, 24 L. ed. 441, 442; that, nevertheless, the logs belonged to the defendant because before they were cut the Indians had removed from the land, causing the right of possession to attach itself to the fee, 95 U. S. 526-527, 24 L. ed. 442. [Italics ours.]

In other words, the interest of the United States in the Indian land, being only a naked fee, did not embrace any vested rights in the timber, but only a right contingent on the Indian occupancy coming to an end—a contingency which happened in that case but might not happen in another.

Referring to *Beecher* v. *Wetherby,* Attorney General Stone in an opinion to the President dealing with the question "whether the Indians' right of 'occupancy and use' included any right to the hidden and latent resources of the land," said:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the *complete equitable property was in the Indians.* The earlier and fundamental decisions make this plain. In *Worcester* v. *Georgia,* 6 Pet. 515, 544, 545, Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right, *as against each other,* which he defines as 'the exclusive right of purchasing such lands as the natives were willing to sell.' As late as 1872 the Supreme Court said: 'Unmistakably their title was

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[1] There were no circumstances present, as in *Leavenworth, etc. R. R. Co.* v. *United States, ante,* indicating an intention *not* to transfer the fee.

> absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land *to* any other governments or their subjects.' (*Holden* v. *Joy*, 17 Wall. 211, 244.)" 34 Ops. A. G. 171, 181. [Italics ours.]

In *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 64 L. ed. 507, the question was whether the pasturing of cattle on the Crow Indian Reservation in Montana without the consent of the Indians violated R. S. U. S. § 2117, prohibiting the pasturing of cattle "on any land *belonging* to any Indian or Indian tribe, without the consent of such tribe." [Italics ours.]

This was a reservation "set apart for the absolute and undisturbed use and occupation of the Indians," Treaty of May 7, 1868, 15 Stat. 649, 650, so that the Crows had only the ordinary Indian title—the right of use and occupation.

The cattle in question were pastured on a part of the reservation which had been ceded to the United States, to be sold for the benefit of the Indians, and the contention was that this part at least was not "land belonging to any Indian tribe."

It was held, however, that even this part of the reservation, until sold by the United States, was "land belonging to [an] Indian tribe," as the United States held it only as a trustee.

In *California & Oregon Land Co.* v. *Worden*, 85 Fed. 94, 96, referring to the title of the Klamath Tribes, which is no different from that under which Indian tribes in general hold their reservations, the District Court held that—

> "For all purposes, therefore, save only that of private sale, the Indians were in fact the owners of these lands."

Thus, as judicially declared, the respective rights of an Indian tribe and of the United States in a reservation occupied by the tribe under what is called the Indian title, whether aboriginal or based on treaty or Executive order, are as follows:

First, the Indians have a right of occupancy in perpetuity, i. e., until voluntary abandonment (subject of course like all private rights to termination by the United States in the exercise of its powers as sovereign upon payment of just compensation), and, so long as they do not commit waste, may exercise this right at their discretion—in such mode as they see fit; that as regards standing timber in particular, while they may not cut it for the *sole* purpose of sale, as that would be waste, they are entitled to cut it as long as their right of occupancy continues, i. e., for an unlimited time, for "use upon the premises," and "for the purpose of improving the land or the better adapting it to convenient occupation," and are entitled to sell all timber cut for the latter purpose.

Second, the United States has a "naked fee," "the right to the ultimate domain," which gives it the right to prevent waste and to recover the proceeds of anything severed from the land by acts constituting waste, and also the right to control alienation of the Indians' interest, but nothing more unless the Indians should abandon possession, in which event the right of possession would attach to the fee.

In other words, the whole beneficial interest belongs to the Indians.

The acts of Congress and the acts and official statements of the Executive Department relating to the disposition of Indian lands likewise recognize that the whole beneficial interest in the lands of an Indian reservation, including

standing timber, mineral deposits, and the like, belongs to the Indians.

The Act of March 3, 1883, provided that:

> "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, * * * shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; * * *."[1] 22 Stat. 582, 590.

The Act of February 8, 1887, § 5, providing for the allotment of portions of Indian reservations among the mem-

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[1] The Court of Claims apparently took the view that this statute is the source of the Indians' right to timber, minerals, etc., on the lands of their reservations. The better view is, we think, that the statute simply recognized a right which already existed. "In respect to legislation and treaties of this character two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden and latent resources, merely gives them its own property as an act of grace. Second, that the Indian possession extended to all elements of value in or connected with their lands, and the government, in securing those values to the Indians, recognizes and confirms their preexisting right. If it were necessary here to decide as between these opposing views, I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent." Opinion of Attorney General Stone, 34 Ops. A. G. 171, 180.

But according to either view, since 1883 the whole beneficial interest in the lands of Indian reservations has belonged to the Indians.

The Government suggests that if, as the Court of Claims seems to have thought, the Indians' right in standing tim-

bers of the respective tribes and for the sale of the remainder to the United States, expressly stipulated that,

> "the sums agreed to be paid by the United States as purchase money for any portion of any such reservations shall be held in the Treasury of the United States

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ber, minerals, etc., was derived from the Act of March 3, 1883, it was a gratuity, and therefore the value of the right must be deducted under the set-off provision of the jurisdictional act in arriving at the amount of the judgment to which the Indians are entitled.

The set-off provision in the jurisdictional act under which this suit was instituted reads—"any *payment*, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel but may be pleaded as an off-set in such suit." [Italics ours.] Another form is—"the United States shall be allowed credit for all *sums*, including gratuities, heretofore *paid* or *expended* for the benefit of said Indians." [Italics ours.]

Assuming for argument's sake that the Indians *did* derive their right in standing timber, minerals, etc., as a grant under the Act of March 3, 1883, and that it was not a preexisting right, it seems plain that such a grant would not be a "payment" to the Indians or a "sum * * * paid or expended" for their benefit within the meaning of these provisions. This view is confirmed by the practical construction which has been put upon the set-off provision in this respect.

The Government cites no case of a suit by an Indian tribe against the United States, and we know of none, in which the United States has claimed or the Court has allowed as an off-set the value of the tribe's timber or mineral rights or the like. This can mean only one of two things: Either that heretofore the Government has considered that the Indians held such rights under their aboriginal or treaty title and not as a gratuity; or, if a gratuity, that it was not a gratuity within the meaning of the off-set provision.

for the sole use of the tribe or tribes of Indians." 24 Stat. 388, 390.[1]

In the recent Act of March 4, 1933, Congress again recognized that the beneficial interest in timber on Indian reservations belongs to the Indians.[2]

Of specific instances where Congress has recognized that the whole beneficial interest in timber on Indian reservations belongs to the Indians, the case of the Chippewa Indians in Minnesota is a good example.

These Indians occupied reservations in Minnesota under the customary Indian title, Treaties of February 22, 1855, 10 Stat. 1165, of March 11, 1863, 12 Stat. 1249, and of May 7, 1864, 13 Stat. 693; *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 499, 57 L. ed. 1299, 1302, on which there stood much valuable pine timber. By an act approved January 14, 1889, 25 Stat. 642, Congress provided for a commission to negotiate with them for the cession to the United States for the purposes of settlement of all but a small part of their reservations upon terms therein stated. One of these was that if and when the cession should be accomplished the *timber lands* should be

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[1] Incidentally, this Act also recognizes the right of the Indians to "just compensation" for any part of reservation lands taken for public use. § 10, 24 Stat. 388, 391.

[2] The Act provides: "The Secretary of the Interior, *with the consent of the Indians involved*, expressed through a regularly called general council, and of the purchasers, is hereby authorized and directed to modify the terms of now existing and uncompleted contracts of sale of *Indian tribal timber*: * * * And provided further, That hereafter no contract of sale of *Indian timber* on the Klamath Indian Reservation in Oregon shall be entered into without the consent of the said general council." 47 Stat. 1568. [Italics ours.]

surveyed and appraised and offered for sale at public auction for not less than their appraised value, §§ 4, 5, *and the net proceeds "placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund,* * * *." § 7. [Italics ours.]

The Commission met with the Indians in a series of councils and the cession was successfully negotiated. Ex. Doc. No. 247, 51st Cong., 1st Sess. Like the act of Congress which authorized it, the whole negotiation proceeded on the assumption on both sides that the beneficial interest in the timber on the reservations belonged to the Indians. Ex. Doc. No. 247, 51st Cong., 1st Sess., pp. 77, 84, 86, 88, 94, 99, 101, 102, 152, 153, 177, 189.

The Act of January 14, 1889, was amended by an Act approved June 27, 1902, 32 Stat. 400, and the Report of Committee on Indian Affairs of the House of Representatives recommending the amendment, like the original act, treats the whole beneficial interest in the standing timber on the reservations as belonging to the Indians. H. R. Rep. No. 1473, 57th Cong., 1st Sess. Thus:

> "It may safely be said that no act has been so troublesome to the Government as has the law to dispose of the timber lands of the Chippewa Indians of Minnesota." *Ibid.*, p. 1.
>
> "This bill, H. R. 13328, amends §§ 4 and 5 of the act of January 14, 1889, and your committee believes that this measure will enable the Secretary of the Interior to dispose of the pine lands at something near their true value; that the Indians will derive a vast sum from the sales, and that great good will result from the change in the manner of selling the timber." *Ibid.*, p. 2
>
> "Your committee knows that legislation which will enable the Secretary of the Interior to protect the interest of the Chippewa Indians of Minnesota is greatly

needed. The timber upon the reservations is very valuable, and, if properly sold, will bring the tribe many millions of dollars." *Ibid.*, p. 3.

Again, the Menomonee Tribe of Indians in Wisconsin occupied a reservation under the usual title, the treaty creating the reservation expressly providing that it was "to be held as Indian lands are held." Treaty of May 12, 1854, Art. 2, 10 Stat. 1064. An Act of Congress approved June 12, 1890, 26 Stat. 146, authorized the *timber* on this reservation to be cut into logs and *sold* to the highest bidder or bidders for cash and then provided that one fifth of the *net proceeds* of sale shall be deposited in the Treasury of the United States for the *use and benefit of the tribe* and the remainder put into a fund in the Treasury with interest at five per centum per annum to be paid to the tribe per capita or expended for their benefit. § 3.

The act further provided that it should not take effect until "the sales of timber and the manner of disposing of the proceeds of same herein authorized have the sanction of the tribe, evidenced by orders of agreement taken in full council; * * *." § 4.

For another instance, the Act of March 1, 1907, 34 Stat. 1012, 1038, directed that a portion of the reservation in the State of Montana occupied by the Blackfeet Tribe of Indians under the Treaty of October 17, 1855, art. 4, 11 Stat. 657, 658, be allotted among members of the tribe in severalty, and that the remainder be sold, the *timber* lands separately, and that the entire net proceeds, including the proceeds of the *timber* lands, "be paid into the Treasury of the United States and placed to the credit of said Indian tribe." Also, it was expressly declared to be "the intention of this Act that the United States shall act as *trustee* for said Indians to dispose of said lands and to expend and

pay over the proceeds received from the sale thereof only as received." 34 Stat. 1036, 1038, 1039. [Italics ours.]

Still another and earlier instance of recognition by Congress that the beneficial interest of an Indian tribe occupying a reservation under the customary Indian title extends to standing timber, minerals, and the like, is the Act of February 6, 1871, 16 Stat. 404, authorizing the sale of two townships of land in Wisconsin, including the growing timber, which had been set apart for the use of the Stockbridge and Munsee Tribes of Indians, §§ 1, 2, and providing that the gross proceeds from the sale, after deducting certain expenses, shall be "paid and appropriated for their benefit," § 4.

The Government would explain these and similar provisions as gifts and not as recognitions of a preexisting right.

But no words of gift are anywhere to be found in these provisions. And even if it could be said to be doubtful whether in enacting them Congress thought it was recognizing a preexisting right of the Indians or was making gifts to them, the doubt would have to be resolved against the latter view, not only because of the strong improbability that the Congress would make such fabulous gifts of public property, but also because, as pointed out in the opinion of Attorney General Stone, 34 Ops. A. G. 180-181, that view would have conflicted with the nature and attributes of the Indian title as judicially expounded from the beginning, of which Congress must be presumed to have known.

Even the Sioux Indians in Minnesota, who waged war against the United States, were paid by authority of Congress the net proceeds realized from the sale of the lands from which they were removed. Rep. Comr. Indian Affairs, 1890, p. XXIX. It is not probable that Congress would be making a gift to a tribe that had waged war against the United States.

Concluding a review of the whole course of legislation on this subject, Attorney General Stone in the beforementioned opinion to the President stated:

> "If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of 'occupancy and use' included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge.[1] *As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time.* * * * In all these instances Congress has recognized the *right* of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the government in surveying and selling the land." 34 Ops. A. G. 178-179. [Italics ours.]

Reflecting the view of the Executive branch of the Government, the Reports of the Commissioner of Indian Affairs time and again treat the beneficial interest in timber on Indian reservations as the property of the Indians. For example:

> "The timber interests of Indians on allotted and on tribal lands reach a present value of $84,000,000. * * * the timber on Indian reservations * * * is valued * * * in Oregon at $27,000,000. * * * In 1911 sales of timber brought in for Indians $2,192,000." Report, 1911, pp. 6-7.

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[1] Even this academic doubt would not exist with respect to timber because of course the Indians *did* have knowledge of that.

Again:

> "The property interests of the Indians constitute one of the greatest estates ever held in trust by any organization, governmental or private. Including the lands, forests, water power, minerals, and funds held in tribal or individual ownership, the Indians' principal amounts to approximately three-quarters of a billion dollars, and from this property in rentals and interest there comes annually approximately $12,000,000." Report, 1911, p. 50.

Again:

> "The timber holdings of the Indians have stumpage value of more than $80,000,000. * * *
>
> "The Indians own tribal and individual timber valued at more than $80,000,000, * * *." Report, 1913, pp. 2-4.

And the Attorney General's Office itself has maintained that the whole beneficial interest in the lands of Indian reservations, including standing timber, mineral content, etc., belongs to the Indians, and that the United States has only a "naked fee."

Reference has already been made to the opinion of Attorney General Stone, in which, after citing the decision in *Beecher* v. *Wetherby,* 95 U. S. 517, 525, 24 L. ed. 440, 441, that a grant by the United States of its estate in an Indian reservation conveys "only the naked fee," he said:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain." 34 Ops. A. G. 181.

And in which he also said that any doubt that might have existed in that regard

> "has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions be-

> ginning many years ago and extending to the present time." 34 Ops. A. G. 178.

And further that—

> "In all these instances Congress has recognized the *right* of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the government in surveying and selling the land." 34 Ops. A. G. 179. [Italics ours.]

The Government says that in this opinion Attorney General Stone did not rule on the question of the Indians' rights in the natural resources of their reservations but only expressed an inclination, quoting the statement in the opinion that "If it were necesary here to decide as between these opposing views I should incline strongly to the latter; * * *."

This position is based on a misconception of what the opposing views were to which the Attorney General referred. They were *not*, as the Government's brief states, "whether in 1924 the Indian tribes had a mere right to use and occupancy or the equivalent of a fee simple title to their reservation," but, as shown in the same paragraph of the opinion, they were, whether the Indians' interest in the natural resources of their reservations was bestowed on them by the grace of Congress or whether it was a preexisting right. P. 180. On either theory, the Indians at the time in question were the beneficial owners of these resources, and the Attorney General so held.

As either theory supported his conclusion, it was not necessary, as he said, to decide as between them. But he expressed an emphatic preference for the view that the Indians' beneficial ownership of the natural resources of their reservations was a preexisting right, and that the acts of Congress merely recognized and confirmed it, adding,

"Support for this view is found in many expressions of the courts," some of which, as we have seen, he then proceeded to cite. Pp. 180-181.

In an opinion relating to the rights in standing timber on lands of the White Mountain Apache Indian Reservation, a reservation created by Executive order, which had been subsequently included in a forest reservation proclaimed by the President under authority of an act of Congress, Acting Attorney General Knaebel said:

> "From the character of the legislation so passed in review,[1] there can be little doubt that in the mind and policy of Congress this reservation was not only a valid reservation set apart for the occupancy and enjoyment of the various tribes which have inhabited it from the beginning, and subject to be allotted in part to the individual members composing them, but was also *devoted to them in its entirety in such a sense that no part of it should be taken from them without their consent or giving something in return by way of compensation. And, of course, no distinction here is to be taken between the land and the timber growing upon it and, presumably, constituting its chief value.* (U. S. v. Cook, 19 Wall. 591.)" 29 Ops. A. G. 239, 244. [Italics ours.]

In *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 48 L. ed. 476, the briefs for the Government de-

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[1] The legislation referred to was as follows: The general allotment act of February 8, 1887, 24 Stat. 388, which was construed as validating (if there were any doubt) Indian reservations created by Executive order; and the Acts of February 20, 1893, 27 Stat. 469, and March 2, 1895, 28 Stat. 894, providing that the net proceeds from the sale of parts of the White Mountain Apache Indian Reservation, including the proceeds from timber, coal and mineral lands, shall be deposited in the Treasury for the use and benefit of the Indians occupying the Reservation.

scribed the title of the Klamath Tribes, which, as before stated, is the ordinary Indian title, as follows:

> "In the next place counsel seem to have mistaken the use by this court of the word 'fee' in distinguishing the sovereign ownership of the Government from the 'right of occupancy' of the Indians, and to look upon this right of occupancy, protected by the non-intercourse laws even in the absence of the treaty, as an insignificant shred of title.
>
> "This court used the word 'fee' merely to suggest by familiar phrase something analogous to the naked fee title to ordinary lands, the beneficial ownership of which is in another. The title of the Government is a sovereign title. The Government has no landlord from whom it holds the 'fee.'
>
> "Not only so, but the so-called 'right of occupancy' is a misnomer also. The right of occupancy, as this Supreme Court views it, is the real ownership. It is the full title, or as much title as, under our conception, any other than the sovereign usually holds." First brief, Oct. Term 1901, pp. 25-26.

And again:

> "The Government never had any real ownership of these Klamath Reservation lands, but only a possibility of acquiring an ownership." Supplemental brief, Oct. Term, 1902, p. 16.

And in a case now pending in the Court of Claims, No. M-109, *Algoma Lumber Co.* v. *The United States,* where the private claimant was making exactly the same contention that the Government is making here,[1] Assistant At-

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[1] "From the foregoing it is clear that the timber upon the unallotted lands within the Klamath reservation belongs to the United States. The Klamath Indians have merely the right to use the land, including the timber, as life tenants, * * *." Brief for Algoma Lumber Co., p. 57.

torney General Sweeny (now United States District Judge) maintained, on the contrary, that,

> "The Klamath Tribe of Indians is the beneficial owner of the timber on the unallotted lands constituting the Klamath Reservation," Brief p. 100,

citing among other authorities the opinion of Attorney General Stone heretofore referred to, with the statement,

> "We invite the Court's attention to those opinions[1] as being an *especially authoritative statement* of the law touching the character of the Indian estate and their ownership of timber on tribal lands occupied by them." Brief p. 111. [Italics ours.]

Thus, there is a uniform body of precedents, judicial, legislative and executive, supporting the view that the whole beneficial interest in the lands of an Indian reservation, including the beneficial interest in the standing timber, mineral deposits, etc., belongs to the Indians.

Respectfully submitted,

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Counsel for Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, as amicus curiæ.

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[1] There was but one opinion, but it was rendered separately to the President, 34 Ops. A. G. 171, and to the Secretary of the Interior, 34 Ops. A. G. 181.